MURUGAYAH

v.

PP

COURT OF APPEAL, KUALA LUMPUR
AHMAD FAIRUZ CJ
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
[CRIMINAL APPEAL NO: B09-24-1999]
15 MARCH 2004

CRIMINAL PROCEDURE: *Appeal - Appeal to High Court - Evidence - Order to take further evidence - Principles on reception of additional evidence - Four conditions in R v. Parks - Unavailability - Relevance - Believability - Reasonable doubt - Whether there must always be an affidavit on evidence proposed to be called - Criminal Procedure Code, s. 317*

EVIDENCE: *Fresh or further evidence - Admission of, on appeal - Order to take further evidence - Principles on reception of additional evidence - Four conditions in R v. Parks - Unavailability - Relevance - Believability - Reasonable doubt - Whether there must always be an affidavit on evidence proposed to be called - Criminal Procedure Code, s. 317*

The accused had earlier been found guilty and convicted by the Sessions Court under s. 326 of the Penal Code. Pending the hearing of his appeal, the accused applied to the High Court to have further evidence taken pursuant to s. 317 of the Criminal Procedure Code ('the CPC'). The learned judge dismissed the application and the accused appealed to the Court of Appeal.

Held (allowing the appeal)
Per Augustine Paul JCA delivering the judgment of the court:

[1] The taking of additional evidence under s. 317 of the CPC is guided by the principles enunciated by Parker CJ in *R v. Parks*, namely, that: (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) the evidence must be credible in the sense that it is well capable of belief; and (iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. It is only in the most exceptional of circumstances and conditions that the court will exercise its discretion to receive additional evidence. (pp 493 d-h & 494 a-f)

[2] In the instant case, it was clear that the four preconditions as laid down in *R v. Parks* had been fulfilled. Although it would be desirable for there to be an affidavit of the proposed evidence, yet it is **not** a necessity in every case where additional evidence is sought to be called to have such an affidavit. It may not be possible to file such an affidavit in some cases. Nonetheless, it is essential that an affidavit that has been filed in support of an application to take further evidence states exactly, *inter alia*, who the proposed witnesses are and what they would be prepared to say or prove. (pp 494 f-h & 495 a-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh sebelum ini didapati bersalah dan disabitkan oleh Mahkamah Sesyen di bawah s. 326 Kanun Keseksaan. Sementara menunggu rayuannya, tertuduh memohon kepada Mahkamah Tinggi supaya keterangan-keterangan lanjut diambil di bawah peruntukan s. 317 Kanun Prosedur Jenayah ('KPJ'). Yang arif hakim menolak permohonan dan perayu merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan)
Oleh Augustine Paul HMR menyampaikan penghakiman mahkamah:

[1] Pengambilan keterangan tambahan di bawah s. 317 KPJ adalah diselia oleh prinsip-prinsip seperti yang dinyatakan oleh Parker H dalam *R lwn. Parks*, iaitu, bahawa: (i) keterangan yang hendak dikemukakan itu haruslah keterangan yang tidak terdapat semasa perbicaraan; (ii) keterangan hendaklah relevan kepada isu-isu; (iii) keterangan hendaklah munasabah dalam ertikata ia harus boleh dipercayai; dan (iv) selepas menimbang keterangan, mahkamah akan menimbang pula kemungkinan wujud keraguan munasabah pada pemikiran juri tentang kebersalahan perayu sekiranya keterangan tersebut diberikan bersama-sama dengan keterangan-keterangan lain di perbicaraan. Mahkamah juga akan hanya menggunakan budibicara menerima keterangan tambahan dalam keadaan dan situasi yang luar biasa sahaja.

[2] Dalam kes semasa, adalah jelas bahawa keempat-empat syarat seperti yang dinyatakan dalam *R lwn. Parks* telah pun dipenuhi. Walaupun ianya membantu sekiranya terdapat suatu afidavit mengenai keterangan yang dicadangkan itu, namun ia bukanlah sesuatu yang mesti ada dalam setiap permohonan untuk mengemukakan keterangan tambahan. Dalam kes-kes tertentu ia mungkin mustahil untuk memfailkan afidavit sedemikian. Walaupun begitu, sesuatu afidavit yang telah difailkan bagi menyokong

permohonan untuk mengambil keterangan lanjut hendaklah, antara lain, menyatakan dengan jelas siapakah saksi-saksi yang dicadangkan itu dan apa yang hendak mereka katakan atau buktikan.

Case(s) referred to:
Che Din Ahmad v. PP [1976] 1 MLJ 289 ***(foll)***
Dol Lasim v. PP [1986] 2 CLJ 197; [1986] CLJ (Rep) 112 SC ***(refd)***
Jum'at Samad v. PP [1993] 3 SLR 338 ***(refd)***
Khamis v. PP [1971] 2 MLJ 267 ***(refd)***
Ladd v. Marshal [1954] 2 All ER 745 ***(refd)***
Lo Fat Thjan & Ors v. PP [1968] 1 MLJ 274
Mohamad Jamal v. PP [1964] MLJ 254 ***(refd)***
R v. Parks [1961] 2 All ER 633 ***(foll)***
Wollongong Corporation v. Cowan [1955] 93 CLR 435 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 317
Penal Code, s. 326

For the appellant - Mohamed Haniff Khatri Abdulla; M/s Haniff & Rajendran
For the respondent - Azhar Abdul Hamid DPP

[Appeal from High Court, Shah Alam; Criminal Appeal No: 42-6-97]

Reported by Gan Peng Chiang

JUDGMENT

Augustine Paul JCA:
The accused was charged with an offence under s. 326 of the Penal Code in the Sessions Court at Shah Alam for having caused grievous hurt to one Kantharupan on 20 November 1993 at a bus stand in Klang. During the trial Kantharupan identified the accused as one of the four persons who had attacked him. He said that the accused was known to him prior to the incident. On 22 February 1997 the accused was found guilty and convicted. He was sentenced to five years' imprisonment and ordered to be given three strokes of the rotan. He appealed to the High Court against the conviction and sentence.

While the appeal was pending the accused made an application to the High Court to adduce additional evidence pursuant to s. 317 of the Criminal Procedure Code from he himself, Kantharupan and one Krisnan. In the affidavit filed in support of the application he affirmed that in May 1998 he was informed, by Krisnan that based on information he has, Kantharupan was assaulted by four other persons one of whom is named Sugumaran. Sometime later he met Kantharupan at the Klang Medical Centre. As he said in para. 10 of his affidavit:

> Saya telah bertanya akan Kantharupan tersebut, dalam bahasa Tamil berhubung keterangan beliau di Mahkamah semasa perbicaraan bahawa saya adalah salah orang yang menyerang beliau. Semasa penyoalan dibuat oleh saya kepada beliau, beliau telah memberitahu saya beliau telah memberi keterangan sedemikian kerana mendiang Dato T.M. Thurai yang telah memberitahunya bahawa saya adalah orang yang memukulnya.

He further affirmed that despite his requests Kantharupan has refused to tell the truth in court even though he knew that it was not the accused who had assaulted him. He then said in para. 16 of his affidavit:

> Saya sesungguhnya percaya bahawa jika Mahkamah Yang Mulia ini memberi peluang kepada saya untuk membuktikan keterangan ini di Mahkamah dan memanggil semula Kantharupan tersebut, bagi tujuan soal-balas oleh peguam saya, Mahkamah Yang Mulia ini boleh menilai samada keterangan Kantharupan tersebut di Mahkamah Sesyen terdahulu, benar atau tidak.

The application was dismissed by the High Court. As the learned judge said in pp. 5-6 of his grounds of judgment:

> Setelah membaca affidavit sokongan pemohon dan mendengar hujah kedua-dua pihak, saya berpendapat bahawa:
>
> (i) keterangan baru melalui perayu dan SP2 adalah keterangan yang tidak boleh didapati pada masa perbicaraan di Mahkamah Sesyen; dan
>
> (ii) keterangan baru yang dicadangkan adalah relevan dengan pertuduhan terhadap perayu dan isu mengenai identiti orang yang mencederakan SP2.
>
> Oleh itu ia telah memenuhi prinsip pertama dan kedua yang dirujuk di dalam *R v. Parks*. Mengenai prinsip ketiga, saya berpendapat bahawa keterangan SP2 adalah berkebolehan untuk dipercayai, jika ia bersetuju memberikan keterangan semula dengan mengatakan bahawa keterangannya dahulu adalah tidak benar dan sanggup berhadapan dengan kemungkinan dirinya dituduh di bawah seksyen 193 Kanun Kesiksaan kerana memberikan keterangan palsu. Malangnya perayu sendiri di dalam afidavit sokongannya menyatakan bahawa SP2 enggan memenuhi permintaannya. SP2 juga tidak ada memfailkan affidavit bagi menyokong permohonan perayu. Dalam keterangan sedemikian, perayu tidak dapat memenuhi prinsip ketiga.
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> Prinsip keempat tidak mungkin dapat dipatuhi oleh perayu memandangkan SP2 enggan bekerjasama dengan perayu. SP2 juga tidak ada memfailkan affidavit bagi menyatakan bahawa ia akan datang dengan sukarela untuk memberi keterangan semula di Mahkamah. Keterangan baru dari perayu sendiri, tanpa disokong oleh SP2, akan merupakan keterangan dengar cakap sahaja. Di samping itu, keterangan daripada perayu sahaja, tanpa keterangan baru daripada SP2, adalah tidak lebih daripada ulangtayang ceritanya yang dahulu di mana ia akan sekali lagi menafikan pertuduhan terhadapnya.

Section 317 of the Criminal Procedure Code, which deals with the reception of additional evidence, reads as follows:

> (1) In dealing with any appeal under this Chapter a Judge, if he thinks additional evidence to be necessary, may either take such evidence himself or direct it to be taken by a Magistrate.
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> (2) When the additional evidence is taken by a Magistrate he shall certify that evidence to the High Court who shall then, as soon as may be, proceed to dispose of the appeal.
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> (3) Unless the Judge otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.
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> (4) The taking of evidence under this section shall, for the purposes of Chapter XXV, be deemed to be an inquiry.

It will be observed that the reception of additional evidence is a matter of discretion. It is settled law that the exercise of a discretion must be in accordance with established judicial guidelines. In the case of adducing additional evidence the guidelines were spelt out in *Ladd v. Marshal* [1954] 3 All ER 745 in the form of three conditions. In elaboration of the conditions Lord Parker CJ said in *R v. Parks* [1961] 3 All ER 633 at p. 634:

> Those principles can be summarised in this way. First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The statement of the law in *R v. Parks* [1961] 2 All ER 633 has been adopted and applied in local cases such as *Mohamad bin Jamal v. PP* [1964] MLJ 254; *Dol bin Lasim v. PP* [1986] 2 CLJ 197; [1986] CLJ (Rep) 112; *Lo Fat Thjan & Ors v. PP* [1968] 1 MLJ 274 and *Che Din bin Ahmad v. PP* [1976] 1 MLJ 289. The conditions are cumulative and not in the alternative and it is for the appellant to satisfy the court that they have been fulfilled (see *Che Din bin Ahmad v. PP* [1976] 1 MLJ 289). It is only in the most exceptional circumstances that the court will receive additional evidence. As Syed Agil Barakbah J (as he then was) said in *Che Din bin Ahmad v. PP* [1976] 1 MLJ 289 at pp. 289-290:

> Now, section 317 of the Criminal Procedure Code gives a discretion to the judge in hearing any appeal to allow additional evidence if he thinks such is necessary. In considering such application the appellate court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence (*Mohamad bin Jamal v. Public Prosecutor* [1964] MLJ 254, 255 per Thomson LP, quoting Hallet J in the case of *R v. Jordan* [1956] 40 Cr App R 152, 154). It is clear, therefore, that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the court.

It was held in *Khamis v. PP* [1971] 2 MLJ 267 that the necessity for additional evidence should be apparent from the record itself and should not be sought from outside information, that is, there should be some prima facie evidence bearing upon the guilt or innocence of the accused to be found on the record itself. In disagreeing with this view Yong Pung How CJ said in *Jum'at bin Samad v. PP* [1993] 3 SLR 338 at p. 344:

> It is not inconceivable that there could be a situation where wholly unexpected evidence would be unearthed after the trial which brings into contention a new aspect which was not addressed at all in the trial.

We are also of the same view. However, we must add that where the additional evidence sought to be adduced is apparent from the record itself it may be resorted to in support of the application. It may also militate against a submission that the proposed evidence is a fabrication.

In considering the application the learned judge held that the first two conditions enunciated in *R v. Parks* [1961] 2 All ER 633 had been fulfilled, that is to say, the proposed evidence could not have been obtained at the time of the trial and that it was relevant to the issue of identity of the person who had injured Kantharupan. We agree with these findings. However, his Lordship was of the view that the third and fourth conditions have not been fulfilled as the accused's affidavit has revealed that Kantharupan has refused to testify in court; that Kantharupan has not affirmed an affidavit to state that he will be attending court voluntarily to testify; and that the proposed evidence of the accused without being supported by the testimony of Kantharupan will be hearsay. The first observation to be made is that even though it is desirable for there to be an affidavit of the proposed evidence it is not necessary in every instance when additional evidence is to be called as it may not be possible to file an affidavit in certain cases. However what is essential is that the affidavit that has been

filed in support of the application must state exactly what witness would be called, exactly what that witness would be prepared to say or prove, or of what inquiries had been made before the trial, or what subsequent inquiries had resulted in the disclosure of the evidence (see *Wollongong Corporation v. Cowan* [1955] 93 CLR 435). On the facts of this case the absence of an affidavit from Kantharupan is understandable in view of his reluctance to attend court. It is therefore not fatal. The ruling that the proposed evidence of the accused is hearsay without being supported by the testimony of Kantharupan is pre-mature. It must be remembered that the accused is applying for leave to call Kantharupan as a witness precisely for the very purpose of proving the statement. A ruling as to whether the evidence is hearsay or not or is to be believed or not can only be made after attempts have been made for Kantharupan to testify, and upon a consideration of his testimony if he testifies, and not at this stage. As clearly explained in the third condition enunciated in *R v. Parks* [1961] 2 All ER 633 it is not the task of the court to decide whether the proposed evidence is to be believed or not. At this stage the function of the court is only to determine whether the proposed evidence, if given, is capable of belief. The proposed evidence assumes significance in view of the testimony of Kantharupan elicited during his cross examination. As he said in answer to questions:

> Benar, saya ada beritahu doctor saya dipukul oleh 4 lelaki India. Saya beritahu apabila ditanya oleh doctor pada hari itu. Benar pada hari itu saya beritahu doctor saya diserang oleh 4 lelaki India yang tak dikenali.

And further on:

> Benar, saya katakan kepada orang yang melawat saya, bahawa saya tak tahu siapa yang menyerang saya. Kali pertama saya beritahu polis salah seorang yang menyerang saya ialah OKT. Dua atau tiga hari selepas saya keluar hospital.

In re-examination he said:

> Saya beritahu doctor saya diserang oleh 4 lelaki India yang tak dikenali. Ketika itu kawan dan keluarga saya ada disitu, saya tak beritahu nama OKT sebagai orang yang menyerang saya kerana saya tak mahu keluarga saya takut atau balas dendam.

It must be observed that the accused had also visited Kantharupan in the hospital. The proposed additional evidence is consistent with the answer given by Kantharupan in cross examination and is therefore capable of belief. This will establish the third condition prescribed in *R v. Parks* [1961] 2 All ER 633. If the proposed additional evidence is established the explanation offered

by Kantharupan in his re-examination as to why he had said that he could not identify the four persons will be wholly demolished. It will be more than enough to raise a reasonable doubt as to the identity of the accused if the evidence had been given at the trial thereby satisfying the requirement of the fourth condition.

In the circumstances we were satisfied that the required four conditions had been established. In the upshot we allowed the appeal.